trading operations; and an observation made in the course of my opinion in *Inland Revenue* v. *Livingston*,(8) was founded on, according to which (1) "a single transaction falls as far short of constituting a dealer's trade, as the appearance of a single swallow does of making a summer. The trade of a dealer necessarily consists of a course of dealing, either actually engaged in or at any rate contemplated and intended to continue." But the question here is not whether the Appellant's isolated speculation in toilet paper was a trade, but whether it was an "adventure ... in the nature of trade"; and in the opinion referred to I said that, in my opinion, "the profits of an isolated venture ... may be taxable under Schedule D provided the venture is in the nature of trade'." I see no reason to alter that opinion. It is no doubt true that the question whether a particular adventure is "in the nature of trade" or not must depend on its character and circumstances, but if – as in the present case – the purchase is made for no purpose except that of re-sale at a profit, there seems little difficulty in arriving at the conclusion that the deal was "in the nature of trade," though it may be wholly insufficient to constitute by itself a trade."

We agree that the test aforementioned is indeed the proper one to apply in this appeal, so that the respondent was properly held to be chargeable under section 4(a) of the Income Tax Act 1967 by the Special Commissioners.

We would therefore allow this appeal. The finding of the learned Judicial Commissioner is set aside and the decision of the Special Commissioners restored.

Costs to the appellant. Deposit to be refunded to appellant.

Appeal allowed.

Solicitors: *Shook Lin & Bok.*

SIVALINGAM v. PUBLIC PROSECUTOR

[F.C. (Lee Hun Hoe C.J. (Borneo), Abdul Hamid F.J. & Abdoolcader J.) March 22 & May 14, 1982]
[Kuala Lumpur – Federal Court Criminal Reference No. 4 of 1982]

Criminal Law and Procedure – Appeal – Whether appeal court can substitute different charge – Reservation of question of law for Federal Court – Criminal Procedure Code, ss. 158, 162 & 316 – Courts of Judicature Act, 1964, s. 66.

In this case the applicant had been charged before the Sessions Court for an offence under section 420 of the Penal Code and found guilty and sentenced to one year's imprisonment. He appealed against the conviction and sentence. The appellate Judge found that an offence under section 420 was not proved but was satisfied that an offence under section 409 had been established. He therefore substituted the charge to one under section 409 of the Penal Code. The conviction remained and the sentence was maintained. The applicant moved the High Court to refer the question of law to the Federal Court but was rejected. The applicant applied to the Federal Court which allowed the application. The question of law reserved for the decision of the Federal Court was as follows:–

"That when an accused is convicted and sentenced for an offence under section 420 of the Penal Code in a Sessions Court and then appeals against conviction and sentence to the High Court, the question arises whether in law, the appellate Judge in dismissing the appeal against conviction and sentence can then proceed to substitute the principal charge under section 420 to a distinct charge under section 409 of the Penal Code without having regard to section 158 and section 162 of the Criminal Procedure Code."

Held: (1) in hearing an appeal from a conviction the power of the Judge to alter a finding must be exercised subject to sections 166 and 167 of the Criminal Procedure Code. The requirements of sections 166 and 167 of the Criminal Procedure Code must therefore be satisfied before a High Court in the exercise of its appellate jurisdiction alters or substitutes a conviction for a different offence;

(2) to warrant a substitution there must be clear evidence that a case for the substituted offence would have been made out or established in the court below;

(3) in this case the substitution of a conviction under section 409 of the Penal Code cannot be said to have been validly made having regard to the circumstances of the case and on the evidence before the High Court. The conviction and sentence should therefore be set aside.

Cases referred to:

(1) *Jagannath Misra* v. *Emperor* A.I.R. 1933 Patna 26.
(2) *Ng Ee* v. *Public Prosecutor* [1941] M.L.J. 180.
(3) *Lew Cheok Hin* v. *R.* [1956] M.L.J. 131.
(4) *Yoong Hock Pin* v. *Public Prosecutor* [1977] 1 M.L.J. 178.

FEDERAL COURT.

Jagjit Singh for the applicant.

Balia Yusof (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Abdul Hamid F.J. (delivering the judgment of the Court): A question of law of public interest is reserved for the decision of the Federal Court under section 66 of the Courts of Judicature Act, 1964 and it reads as follows:–

"That when an accused is convicted and sentenced for an offence under section 420 of the Penal Code in a Sessions Court and then appeals against conviction and sentence to the High Court, the question arises whether in law, the appellate judge in dismissing the appeal against conviction and sentence can then proceed to substitute the principal charge under section 420 to a distinct charge under section 409 of the Penal Code without having regard to section 158 and section 162 of the Criminal Procedure Code."

This was a case where the applicant was charged before the Sessions Court for an offence under section 420 of the Penal Code and found guilty and sentenced to one year's imprisonment. He appealed against the conviction and sentence. The appellate Judge found that an offence under section 420 was not proved but was satisfied that an offence under section 409 had been established. He therefore substituted the charge to one under section 409 of the Penal Code. Conviction remained and sentence was maintained.

The applicant moved the High Court at Seremban to refer the question of law to this court but was rejected by Abdul Razak J. We have, however, allowed it.

In rejecting the application the learned Judge applied *Jagannath Misra* v. *Emperor*(1) in which case the power was exercised by a Sessions Court in India in an appeal from a Magistrate's Court. It is the applicant's contention that there is no such provision in this country. The learned Judge saw no merit in the contention and held that the courts may be different but the principle is the same.

Applying *Misra's* case the learned Judge said –

"In the *Misra* case the money had been handed to the petitioner by A on the former undertaking to hand it over to B as an advance to the latter on the security of a mortgage to be executed by B in favour of A. The petitioner had denied receiving any money let alone misappropriating it. It was argued at the High Court appeal

that there was no evidence of entrustment and there was therefore no case for substitution but it was held that in view of the finding of the President Sessions Court that the money was paid to the petitioner for the purpose of advancing it on a mortgage, the contention had no substance. Likewise, in the present case it was argued that a substitution was highly prejudicial to the accused because there was no case of a criminal breach of trust and the applicant had no opportunity to rebut the new charge. But in my view considering the facts it could hardly be said that the applicant in our case had been prejudiced any more than the petitioner in *Misra's* case could be said to have been by the substitution. In our case also the applicant had received money in the sum of $2,000 from the complainant, the depositor, on the clear and implied undertaking by the applicant by virtue of his position to keep it on trust for the complainant. He had instead misappropriated that sum because only $1,000 had been accounted for by him. The present applicant is thus in a worse position than the petitioner in *Misra's* case because while in the latter the petitioner had totally denied receiving the money from the complainant, in our case the applicant had admitted receiving the $2,000 but denying that it was handed to him by the complainant but by another person one Thirumalai. The President Sessions Court however found that it was the applicant who did so. This finding of fact by the learned President Sessions Court was never challenged by counsel for the applicant before me. But the defence if it had been accepted by the President Sessions Court would have discharged the charge under cheating in as much as one under criminal breach of trust. It is not open to the applicant therefore now to say that he had not been given the opportunity to meet the new charge."

The learned Judge then held that the High Court, exercising its appellate jurisdiction, is empowered under section 316(b) of the Criminal Procedure Code to effect substitution and that this was clearly decided in *Ng Ee* v. *Public Prosecutor*[2]. We shall examine the decision in *Ng Ee's* case shortly. What we now have to consider is the effect of section 316(b) of the Criminal Procedure Code more particularly that part we have italicized which reads –

"316. At the hearing of the appeal the Judge may, if he considers there is no sufficient ground for interfering, dismiss the appeal, or may –

(a) .....

(b) *in an appeal from a conviction* or in an appeal as to sentence

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be retried or committed for trial; or

(ii) *alter the finding*, maintaining the sentence, or with or without altering the finding reduce or enhance the sentence or alter the nature of the sentence; ..... "

Now the appeal before the learned Judge was an appeal from a conviction, and evidently, as we can see, there is a specific provision under our law that empowers a judge to alter a finding. The pertinent question that calls for determination, however, is the scope of such power.

We refer firstly to *Mallal's* Criminal Procedure Code 4th Ed. at p. 466 where it is stated that –

"The finding which an appellate Court may alter under para (b) may relate to an offence with which the prisoner was charged in the court below or to one of which he might be convicted without a distinct charge."

The reason for this seems obvious. If for example, the prisoner is charged in the Court below with a charge under section 420 of the Penal Code or with section 420 and alternatively under section 406 of the Penal Code and is convicted under section 420 in an appeal against the conviction, the appellate Court may, provided the facts support either charge or the alternative charge, as the case may be, alter a finding and substitute a conviction for a different offence, for example, with one under section 406 Penal Code. That power to alter is derived from section 167 of our Criminal Procedure Code which provides for the conviction of another offence a person is shown to have committed although he was not charged with it provided however the case is one that comes within the confines of section 166 of our Criminal Procedure Code and there is evidence to support the conviction for that different offence. For convenience we reproduce both sections 166 and 167 of the Criminal Procedure Code as follows –

"166. If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with such offences; and any number of such charges may be tried at once, or he may be charged in the alternative with having committed some one of the said offences.

167. If in the case mentioned in the last preceding section the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed although he was not charged with it."

As for the application of section 167 it is stated in *Mallal's* Criminal Procedure Code 4th Ed. at p. 420 that –

"This section has to be read with section 165. This section applies only to a case which section 165 applies. If the facts of the case do not fall under section 165, this section has no application."

In terms of our Criminal Procedure Code it means that section 167 has to be read with section 166 and section 167 applies only to a case to which section 166 applies. If the facts of the case do not fall under section 166, then section 167 has no application.

The point was taken by the High Court in Singapore in *Lew Cheok Hin* v. *R.*[3] In this connection it is useful to refer to a passage of the judgment set out in *Mallal's* Criminal Procedure Code at p. 241, which provides an illustration of a case where a person charged with one offence can be convicted of another –

"Some cases admit of a partial defence. The simplest example is the every day Magistrate's case of a man who hits somebody with a billet of firewood and breaks his arm. The police always, and correctly, charge the man with voluntarily causing grievous hurt. There is seldom any reason to amend at the close of the prosecution. The defence may, however, raise a doubt as to whether the intention was to cause grievous, as distinct from the simple, hurt. There is no point whatever in amending the charge at that stage. The charge informed the prisoner what he had to meet and he has already met it, with success on one point. The unrebutted residue, however, constitutes a complete offence. The Code provides that in such a case the court can forthwith convict of the reduced offence without the formality of an amendment which at that stage would be quite useless to the accused. In short, every charge of a complex offence is deemed in law to comprise a charge of any less complex offence constituted by some of the same particulars."

and further down on the same page Taylor J. said –

"At first sight it seems startling that a prisoner should be summarily convicted, without express notice, of an offence quite different from the one charged. The section does not mean that. Its apparently general terms must be understood as an exception of very limited scope, to the general rule."

It is to be observed that *Ng Ee's* case was relied upon by the learned Judge. In that case Cussen J. held that

"The power of substitution of a conviction under a different provision of the law for the conviction found by the Magistrate is to be exercised with great caution, and only where it is clear beyond all doubt, from the nature of the offence and the record of evidence in the case, that to do so can in no way prejudice the case of the accused. It must be clear that if the substituted charge had in fact been the original charge the proceedings at the trial would have taken the same course, and the evidence recorded been the same –

that the prosecution evidence would have been unchanged (substantially) and the accused's evidence the same."

Cussen J. has clearly laid down some tests which must be satisfied before the power to alter or substitute can be exercised and the reasons for exercising great caution are obvious. They can be gathered from what we have to say shortly.

Our law clearly allows the Judge of a High Court in an appeal against conviction to alter a finding. Section 316(b) provides that power. This is consistent with section 26 of the Courts of Judicature Act which states that the appellate criminal jurisdiction of the High Court shall consist of the hearing of appeals from Subordinate Courts according to any law for the time being in force within the territorial jurisdiction of the High Court. Certain provisions of the Criminal Procedure Code general in nature are also relevant for purposes of hearing such appeals. Sections 166 and 167 of the Criminal Procedure Code are examples of such provisions. In hearing an appeal from a conviction the power of the judge to alter a finding must in our view be exercised subject to sections 166 and 167 of the Criminal Procedure Code.

The requirements of sections 166 and 167 of the Criminal Procedure Code must be satisfied before a High Court in the exercise of its appellate jurisdiction alters or substitutes a conviction for a different offence. Although therefore an appellate court is possessed of the power which it can lawfully exercise, it is equally essential that such power be exercised within the confines of the law. The question is to what extent and under what circumstances such power can be invoked. What is clear in our minds is, and we emphasise, that such power must be exercised under limited circumstances and with great caution subject to the restriction imposed by section 167 of the Criminal Procedure Code, and it must be done so as not to prejudice the case of an accused.

In our view *Ng Ee's* case was correctly decided and to warrant a substitution there must be clear evidence that a case for the substituted offence would have been made out or established against the accused in the court below. To put it in another way before there can be an alteration of a finding the appellate court must be satisfied that if the substituted charge had in fact been the original charge, the proceedings at the trial would have taken the same course, and the evidence recorded have been same. Further, if the substituted charge was one of the charges preferred against the accused or was an alternative charge the prosecution evidence would have been sufficient to satisfy the elements to constitute the charge and the accused's evidence must have been substantially unchanged in that the accused's defence would have been the same.

We hasten to observe that we are not dealing with the question of amendment of the charge by a Judge on appeal. We do not therefore see any necessity to deal with *Yoong Hock Pin* v. *Public Prosecutor*[4]. In this regard we do not consider section 158 and section 162 of the Criminal Procedure Code referred to in the question reserved relevant to the determination of the question. Section 158 deals with the power of the court to alter or add to any charge at any time before judgment is pronounced and as such cannot apply to the issue at hand which essentially is related to and concerned with the question of the power of the High Court in the exercise of its appellate jurisdiction. Section 162 is a consequential provision dealing with recall of witnesses after an alteration of a charge.

In the light of the foregoing we are of the view that while, there is power of a High Court on appeal to alter or substitute a finding the question posed before us must be answered in the negative. We find that the learned Judge had erred in law in substituting a conviction for another charge for clearly this case did not come within the confines of section 166 and section 167 of our Criminal Procedure Code.

The applicant was charged with only an offence of cheating under section 420. To warrant a conviction under section 409 of the Penal Code there must be evidence that he committed a different offence, i.e. section 409. The law is clear. It is the necessary ingredients of a charge under section 409 of the Penal Code that an accused must either be a public servant, banker, merchant, etc. and that he must have been entrusted with property in his capacity of such public servant, banker, etc. Strictly it means that the ingredients required to prove an offence under section 409 of the Penal Code are not exactly the same as those under section 420. These ingredients were not in the case under consideration required to be proved by the prosecution to establish a case under section 420 and for this reason the President Sessions Court was never called upon to consider whether these elements were satisfied. On the materials before us there is nothing to show that the learned Judge considered whether these elements were established.

In our judgment the substitution of a conviction under section 409 of the Penal Code cannot be said to have been validly made having regard to the circumstances of this case and on the evidence before the High Court.

Following *Yoong Ho Pin's* case we have to go beyond answering the question of law posed by ordering that the conviction substituted by the learned Judge without restoring the conviction under section 420 of the Penal Code and the sentence be set aside.

Appeal allowed.

Solicitors: *Jagjit Singh & Co.*

M.R.K. NAYAR v. PONNUSAMY & ORS.

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Abdul Hamid F.JJ.) March 9 & May 22, 1982]
[Johore Bahru – Federal Court Civil Appeal No. 290 of 1980]

Practice and Procedure – Interlocutory Injunction – Material facts not disclosed – Discretion of court – Injunction dissolved.

In this case the respondents had agreed to buy a piece of land from the owners. Subsequently the respondents entered into a joint venture agreement with the appellant and Liew Sin. The appellant and Liew Sin offered to buy the respondents out but the respondents refused. There was a delay in the subdivision of the land and so the allotment of the land could not be carried out. Liew Sin assigned his interests to the appellant and the appellant lodged a caveat against the land and sued the respondents. He then obtained an interlocutory injunction to restrain the respondents from selling